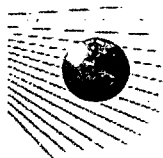


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Wendy
Chipp/OCF/R8/USEPA/US
09/26/2008 01:47 PM

To Sandy Fells/OCF/R8/USEPA/US@EPA
cc Amy Hayden/DC/USEPA/US@EPA, Andy
Lensink/ENF/R8/USEPA/US@EPA, Bill
Murray/EPR/R8/USEPA/US@EPA, Carol
bcc
Subject Inside EPA: Baucus Call For Superfund Health 'Emergency'
May Set Key Cleanup Precedent

Baucus Call For Superfund Health 'Emergency' May Set Key Cleanup Precedent

Sen. Max Baucus' (D-MT) vow to force EPA to declare a public health emergency under Superfund law to address asbestos contamination stemming from a mine in Libby, MT, could set a precedent triggering landmark nationwide residential cleanup actions for structural products and requiring financial assistance for victims' health care that the law typically bars.

Baucus is seeking to force the agency to declare a public health emergency to address contamination from the mine after a report Democrat investigators prepared with assistance from EPA's Inspector General suggested that White House officials may have blocked EPA in 2002 from issuing the finding.

The findings contradict long-standing claims by Bush administration appointees at EPA, who have long denied claims that the White House blocked agency efforts to declare the emergency.

IG investigator Stephen Nesbitt said during a Sept. 25 hearing on the report that his office presented its own findings, which he said included potential criminal violations, to the Department of Justice (DOJ), but that DOJ declined to prosecute after determining "that the initiation of criminal proceedings was not warranted."

According to Baucus, Nesbitt and other witnesses at the hearing, a public health emergency would set a number of precedents. Nesbitt explained that the Superfund law -- the Comprehensive Environmental Response and Compensation Act (CERCLA) -- generally bars EPA from using Superfund money to clean up "products," such as the asbestos-containing Zonolite Attic Insulation (ZAI) that the W.R. Grace company produced in Libby, unless it declares that it constitutes a public health emergency under section 104 (a) (4) of the law.

The section of the law provides an exception to the law's general limitation barring regulators from requiring cleanup actions for "products which are part of the structure of, and result in exposure within, residential buildings or business or community structures."

And Baucus noted that an emergency declaration under Superfund would allow EPA to do a more extensive cleanup of homes and other structures and would mandate that the Agency for Toxic Substances and Disease Registry "provide medical care and testing to exposed

individuals.”

“In the words of an EPA Region VIII attorney, ‘EPA rarely finds health problems of the magnitude of those found in Libby,’” Baucus said during the Sept. 25 oversight hearing. “If a precedent is to be set using this section of CERCLA [to declare a public health emergency], Libby is an appropriate place to do so,” he quoted the official saying.

Similarly, Dr. Brad Black, director of the non-profit Center for Asbestos Related Disease in Libby, testified that health care provided under an emergency declaration would surpass that which is currently provided by W.R. Grace and could also provide assistance to those exposed to Libby-generated asbestos in other parts of the country.

In one sign of the scope of the contamination, EPA officials are poised to begin indoor tests for Libby asbestos in 30 to 50 homes in northeast Minneapolis next week, according to local press reports. The reports say Grace provided its asbestos waste at no charge to unsuspecting local homeowners who used the substance as fill in their homes’ driveways and gardens.

Nesbitt testified that in a November 2001 draft memo, EPA’s on-scene coordinator in Libby proposed that the agency should make such a declaration and, according to internal emails, officials in EPA Region VIII and the agency’s Office of Solid Waste and Emergency Response agreed with the proposal until February 2002, when White House Office of Management and Budget (OMB) staff began to raise questions and express doubts over whether the declaration was necessary.

EPA’s Office of Prevention, Pesticides, and Toxic Substances also raised concerns, “noting that declaring a public health emergency requiring the removal of ZAI could then necessitate its removal from homes nationwide, which could cost billions of dollars,” Nesbitt told the hearing.

Baucus is now vowing to do everything in his power to force EPA to make a public health emergency declaration at the site. Although he concedes there may be little chance to do anything in the 110th Congress, Baucus vows to push the issue next year. To bolster his effort, the lawmaker is pointing to a new report -- drafted by Senate environment committee majority staff -- that suggests top White House and EPA officials may have prevented the agency from making such a declaration.

According to the report, which Democratic aides conducted with assistance from OIG and that Baucus unveiled at the oversight hearing, at least some EPA officials cited the high cost of a potential nationwide cleanup as a reason for opposing the declaration. The W.R. Grace company, which would be potentially liable for the cleanup, also objected to the declaration, according to IG officials.

The report says then-EPA Administrator Christine Todd Whitman was briefed on the proposal in March 2002, and a draft press release was later prepared for her announcing a planned declaration of a public health emergency. But following an April 2002 letter from

W.R. Grace objecting to the proposed declaration and communications involving EPA, OMB and White House Council on Environmental Quality (CEQ) officials, a new memorandum was circulated in May 2002 that removed all references to a public health emergency” Nesbitt's testimony says.

According to Baucus, high-level White House officials were copied on a May 8, 2002 e-mail between Marcus Peacock -- the current EPA deputy administrator and then an OMB official -- and Elizabeth Stolpe then of CEQ, in which Peacock tells Stolpe that OMB's Office of General Council and Nancy Dorn, then the second-ranking official at OMB have put a hold on EPA's announcement regarding Libby. Among others, the email was copied to CEQ Chairman James Connaughton, Jay Leftkowitz, deputy director of domestic policy at the White House, and Karen Knutson, of Vice President Dick Cheney's office.

Then-EPA waste chief Marianne Horinko, who was also copied on the Peacock-Stolpe email according to Baucus, ultimately signed a final memo on May 9, 2002, which allowed for the clean up of homes and yards in Libby at a cost of \$54 million without declaring a public health emergency under Superfund, Nesbitt noted in his testimony. EPA did not seek reimbursement from W.R. Grace for the residential cleanup costs, Nesbitt notes.

Horinko told the *Associated Press* Sept. 24 that she did not have “any recollection of OMB telling us not to do that,” adding, “it was a public policy decision on Gov. Whitman's part.”

Her comments are consistent with Whitman's own statements at the time following earlier revelations of the issue. Whitman told Sen. Patty Murray (D-WA) in early 2003 that, “Ultimately, EPA chose not to rely upon [Superfund's] health emergency provision, in part, to minimize the possibility of removal work being delayed by possible legal challenges to this novel approach, and instead relied upon more traditional removal authorities,” Whitman's letter says.

Whitman also says OMB played no role in the agency's decision to refrain from issuing a health warning. “I want to make it clear that neither OMB nor any other federal agencies directed EPA to take a specific course of action regarding whether to employ the public health emergency provision of [Superfund],” the letter states.

Baucus also charged that EPA officials refused to allow Paul Pernard, a former EPA on-scene coordinator for the Libby site, and Christopher Weiss, a senior EPA toxicologist in Region VIII, to testify at the hearing or be interviewed by IG investigators and committee staff. Current EPA Administrator Stephen Johnson also refused testify at the hearing, Baucus said.

According to a Sept. 24 letter from Johnson to Baucus, EPA initially agreed to allow Peronard testify but then learned he would not be able to attend “due to personal obligations.” Johnson said that he was unable to testify himself due to “prior travel commitments.”

Carol Rushin, acting regional administrator for Region VIII and Mike Ciran, EPA's Libby Remedial Project Manager arrived at the hearing in their place, but left after Democratic aides told them they would not be permitted to testify because they were "not familiar with the issues" that would be the focus of the hearing. Johnson had argued in his letter that Rushin and Cirian "would be the ideal witnesses to talk about what is going on directly at the Libby site."

Baucus told reporters following the hearing that it would likely be difficult to force the agency to declare the public health emergency this year given limited amount of time left in the legislative session, but that next year he would do everything possible to try and force the issue. --*Douglas P. Guarino*

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